

**FILED**

**JUN 16 2006**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

MICHAEL NOEL FLUHARTY,

Petitioner - Appellant,

v.

TERESA ROCHA, JR., California  
Department of Corrections Director aka  
Steve Cambra, Jr.; et al.,

Respondents - Appellees.

No. 02-56225

D.C. No. CV-01-00909-GAF

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Gary A. Feess, District Judge, Presiding

Submitted June 12, 2006<sup>\*\*</sup>

Before: FERNANDEZ, KLEINFELD, and BERZON, Circuit Judges.

California state prisoner Michael Noel Fluharty appeals from the district court's judgment dismissing as untimely his 28 U.S.C. § 2254 habeas petition challenging his conviction for corporal injury to a cohabitant.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Upon review of the record, we affirm the district court's conclusion that Fluharty was not entitled to statutory tolling under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), although for different reasoning than upon that relied on by the district court. *See Moran v. McDonald*, 80 F.3d 1261, 1268 (9th Cir. 1996).

Under 28 U.S.C. § 2244(d)(2), AEDPA's one-year limitations period is tolled for "the time during which a properly filed application for State post-conviction or other collateral review . . . is pending." Here, the California Superior Court cited unjustified delay as a basis for denying Fluharty's November 29, 1999, state habeas petition. Because the California courts dismissed Fluharty's petition as untimely, his petition was not properly filed under AEDPA. *See Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1812 (2005) ("when a postconviction petition is untimely under state law, that [is] the end of the matter for purposes of § 2244(d)(2)") (internal quotations omitted); *see also Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005) ("Because the California courts dismissed Bonner's petition as untimely, his petition was not 'properly filed' under AEDPA.").

As Fluharty did not challenge the district court's denial of equitable tolling, we do not reach this issue on appeal.

**AFFIRMED.**